SUPREME COURT, U.S.
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No. 10-638

In the Supreme Court of the United States

NANCY J. WETHERILL, PETITIONER

v.

JOHN MCHUGH, SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a military technician (dual status) may maintain a suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(a), to recover for alleged discrimination arising out of activity incident to her military service.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 616 F.3d 789. The order of the district court (Pet. App. 26a-39a) is reported at 644 F. Supp. 2d 1135.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 2010. The petition for a writ of certiorari was filed on November 9, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress has exercised its extensive constitutional powers over matters of national defense by estab-

lishing the armed forces of the United States. These forces consist of the Army, Navy, Air Force, Marine Corps, and Coast Guard. See 32 U.S.C. 101(2). The armed forces each have reserve components in order to provide trained military units as a supplement "[i]n time of war or national emergency, and at such other times as the national security may require." 10 U.S.C. 10102. The reserve components of the Army are the Army Reserve and the Army National Guard of the United States. 10 U.S.C. 10101. This case concerns an attempt by a military technician (dual status) in the Army National Guard to sue the Secretary of the Army and others under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(a), to recover for alleged discrimination arising out of activity incident to her military service.

a. Military technician programs originated during the World War I era, when state National Guard organizations created hybrid positions, held by state employees who were also Guard members, to perform maintenance and clerical duties. See Michael J. Davidson, *Neither Man Nor Beast: The National Guard Technician, Modern Day Military Minotaur*, Army Lawyer 49, 51 (Dec. 1995). The National Guard technician program continued after 1933, when Congress created two overlapping but distinct organizations—the National Guard of the various States and the National Guard of the United States—and required all persons enlisted in a state National Guard to be simultaneously enlisted in the National Guard of the United States. See *Perpich* v. *Department of Def.*, 496 U.S. 334, 345 (1990). Thus, members of a state National Guard, including National Guard technicians, are also reserve members of the

Army. See *ibid.*; 10 U.S.C. 10143 (discussing Selected Reserve, which includes National Guard members).

In 1968, Congress conferred federal civilian employee status on National Guard technicians. See National Guard Technicians Act of 1968, Pub. L. No. 90-486, 82 Stat. 755. In so doing, Congress sought to aid recruitment and retention for those positions by providing those "essentially state military personnel" with federal retirement and fringe benefits while preserving "the essential military requirements" of the positions. *American Fed'n of Gov't Employees* v. *FLRA*, 730 F.2d 1534, 1543 (D.C. Cir. 1984) (*AFGE*).

The 1968 Act recognizes two types of National Guard technicians—dual-status, 32 U.S.C. 709(b), and non-dual-status, 32 U.S.C. 709(c). A dual-status technician must be a member of the National Guard, hold the military grade specified by the Secretary for that position, and wear a military uniform while performing his or her duties. 32 U.S.C. 709(b). Dual-status technicians work as civilians in their military unit, serve as members of the military with the same or a related unit, and are available at all times to be called into active federal service. See *AFGE*, 730 F.2d at 1545; Nat'l Guard Bureau, Technician Pers. Reg. 303, para. 2-1.b (Aug. 24, 2005). They are assigned substantially equivalent duties in their civilian and military positions and usually report to the same military supervisor in both capacities. See *id.* paras. 1.1, 2-1.b; DoD Instruction No. 1205.18, para. 6.101 (May 4, 2007).[1]

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[1] In 1957, the Air Force created its own reserve technician program. See *American Fed'n of Gov't Employees* v. *Hoffman*, 543 F.2d 930, 932-936 (D.C. Cir. 1976), cert. denied, 430 U.S. 965 (1977). The question whether dual status military technicians in the Air Force may bring Title VII suits that arise out of their military service is presented by the

b. In 1996, Congress enacted legislation requiring all National Guard and other military technicians hired thereafter to be dual-status, *i.e.*, to maintain membership in the armed forces reserves as a condition of their federal employment. National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 513, 110 Stat. 305-306. That legislation alternately referred to the technicians as "military technicians" and as "dual-status military technicians." *Ibid.* Appropriations legislation used still different terminology, referring to the technicians as "military (civilian) technicians." Department of Defense Appropriations Act, 1996, Pub. L. No. 104-61, § 8087, 109 Stat. 668.

In a separate law enacted later in 1996, Congress provided a military-wide definition for the "military technician" position:

> Military technicians are Federal civilian employees hired under title 5 and title 32 who are required to maintain dual-status as drilling reserve component members as a condition of their Federal civilian employment. Such employees shall be authorized and accounted for as a separate category of dual-status civilian employees, exempt as specified in subsection (b)(3) from any general or regulatory requirement for adjustments in Department of Defense civilian personnel.

National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 1214, 110 Stat. 2695 (10 U.S.C. 10216).

In 1997, Congress adopted a new title for the position-- "military technician (dual status)"—and sought to

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petition for a writ of certiorari filed in *Zuress* v. *Donley*, No. 10-374 (filed Sept. 16, 2010).

amend every provision of the United States Code that mentions the position to use that nomenclature. National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, § 522(a) and (g)-(i), 111 Stat. 1734, 1735-1736. The House Report accompanying the amendments explained that clarification was needed because previous enactments contained "provisions defining the term 'military technician' which were not completely consistent with one another." H.R. Rep. No. 132, 105th Cong., 1st Sess. 358 (1997) (*House Report*). The amended definition, the Report explained, "would remove the inconsistencies" by providing a uniform definition for the term "military technician (dual status)." *Ibid.*

As amended in 1997, the definition of "military technician (dual status)" provides as follows:

> For purposes of this section and any other provision of law, a military technician (dual status) is a Federal civilian employee who—
>
> (A) is employed under section 3101 of title 5 or section 709(b) of title 32;
>
> (B) is required as a condition of that employment to maintain membership in the Selected Reserve; and
>
> (C) is assigned to a civilian position as a technician in the administration and training of the Selected Reserve or in the maintenance and repair of supplies or equipment issued to the Selected Reserve or the armed forces.

10 U.S.C. 10216(a) (2000).

c. Based on the principle that waivers of sovereign immunity are strictly construed and the doctrine of intra-military immunity derived from *Feres* v. *United*

States, 340 U.S. 135 (1950), the courts of appeals have uniformly concluded that Title VII does not apply to uniformed members of the armed forces. See *Hodge* v. *Dalton*, 107 F.3d 705, 708 (9th Cir.) (citing cases), cert. denied, 522 U.S. 815 (1997). The courts of appeals have also uniformly concluded that dual-status military technicians may not bring Title VII suits based on alleged discrimination that is incident to their military service. See, *e.g.*, *Overton* v. *New York State Div. of Military & Naval Affairs*, 373 F.3d 83, 96 (2d Cir. 2004); *Brown* v. *United States*, 227 F.3d 295, 299 (5th Cir. 2000), cert. denied, 531 U.S. 1152 (2001); *Fisher* v. *Peters*, 249 F.3d 433, 443-444 (6th Cir. 2001); *Hupp* v. *United States Dep't of the Army*, 144 F.3d 1144, 1148 (8th Cir. 1998); *Mier* v. *Owens*, 57 F.3d 747, 748 (9th Cir. 1995), cert. denied, 517 U.S. 1103 (1996); see also *Willis* v. *Roche*, 256 Fed. Appx. 534, 537 (3d Cir. 2007).

Like other members of the military, dual-status technicians have numerous alternative remedies for service-related discrimination claims. For example, a dual-status National Guard technician who believes that he or she has suffered service-related discrimination may seek assistance from a military Equal Opportunity advisor or any member of his or her unit chain of command and may file a formal or informal complaint. See Nat'l Guard Reg. 600-22, paras. 2-1, 2-2 (Mar. 30, 2001). A formal complaint triggers a review, and, if appropriate, an investigation of the technician's allegations by the applicable level of command. See *id.* para. 2-2.c. If the complaint is not resolved to the technician's satisfaction, the complaint is automatically referred to successive higher levels of command. See *id.* para. 2-2.e and f. Dual-status National Guard technicians also may pursue relief from the Army Board for Correction of Military

Records, see 10 U.S.C. 1552 (2006 & Supp. III 2009), and may bring federal court actions seeking injunctive relief for alleged violations of the Constitution. See, *e.g.*, *Brown* v. *Glines*, 444 U.S. 348 (1980); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973).

2. Petitioner, who is a Japanese-American woman, began working for the South Dakota Army National Guard in 1974. She was commissioned as an officer on July 4, 1977, and was promoted to Colonel on July 1, 1999. During this time, she was employed as a dual-status National Guard technician. Pet. App. 3a.

National Guard Colonels who have not been recommended for promotion to a higher rank are required to retire from the military after 30 years of commissioned service. 10 U.S.C. 14507(b). Thus, unless petitioner was promoted beyond the rank of Colonel, her mandatory retirement date from the military was July 31, 2007. Pet. App. 3a. Under Civil Service Retirement System regulations, however, petitioner could not qualify for a full civil service retirement annuity unless she continued working as a civilian federal employee for an additional three years and five months, until December 31, 2010. *Ibid.* And, under 10 U.S.C. 10216(a) and 32 U.S.C. 709(b), petitioner could not maintain her civilian job once she retired from the military. Pet. App. 3a.

Petitioner therefore asked the then-Adjutant-General of the South Dakota Army National Guard (Major General Michael A. Gorman) to waive her mandatory date of retirement from the Guard so that she could continue working until her civil service annuity fully matured. General Gorman granted her request on May 10, 2007, and the National Guard approved his decision on July 18 of the same year. Pet. App. 4a.

In September 2007, General Gorman retired, and Brigadier General Steven R. Doohen was appointed Adjutant-General of the South Dakota Army National Guard. In January 2008, General Doohen asked the National Guard to revoke the waiver that petitioner had been given. General Doohen informed petitioner about his request in February 2008, and told her, petitioner alleges, that he had made it for "force management" reasons. Pet. App. 4a (quoting *id.* at 48a (Compl. para. 15)). The National Guard approved General Doohen's request, and petitioner's mandatory date retirement date was reset to July 31, 2008. *Ibid.* Between May and July of 2008, petitioner was reassigned to a building where she worked in a room by herself and was given work that she alleges "no Colonel would ever be required to perform." *Ibid.* (quoting *id.* at 48a (Compl. para. 19)). Petitioner retired from the Guard on July 31, 2008, and thus had to relinquish her civilian job as well. *Id.* at 5a.[2]

Petitioner complained about the above actions both formally and informally to the National Guard's Office of Equal Opportunity and Civil Rights, alleging sex and/or national origin discrimination. After the National Guard Bureau denied her request for administrative relief, she filed this action in federal district court

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[2] Upon petitioner's retirement, she qualified for an immediate civil service annuity under 5 U.S.C. 8336 (2006 & Supp. III 2009). Because petitioner was less than 55 years old on the date of her retirement, however, her annuity was subject to a slight reduction pursuant to the formula prescribed in 5 U.S.C. 8339 (2006 & Supp. III 2009). We are informed by the National Guard Bureau that, on September 7, 2010, petitioner was hired as a re-employed annuitant under 5 U.S.C. 9902 (Supp. III 2009), and she remains employed in that capacity. When petitioner turns 60 years old, she will also begin receiving a military pension. 10 U.S.C. 12731 (2006 & Supp. III 2009).

against the Secretary of the Army, the Army National Guard, General Doohen and another general, and the South Dakota Army National Guard. The complaint alleged discrimination and retaliation based on sex and/or national origin in violation of Title VII, 42 U.S.C. 2000e-2(a)(1). See Pet. App. 4a-5a.

3. The district court dismissed petitioner's complaint, holding that principles of intra-military immunity barred consideration of her Title VII claims. Pet. App. 26a-39a. The district court noted that some courts of appeals have held that "there may be liability under Title VII for some decisions that involve the purely civilian aspects of" a dual-status technician's position. *Id.* at 34a (citing decisions from the Second, Fifth, and Ninth Circuits). Other circuits, the district court stated, "have found that military technicians are 'irreducibly military in nature,' and, therefore, civil suits are always nonjusticiable" under intra-military immunity principles. *Ibid.* (quoting *Fisher*, 249 F.3d at 443).

The district court concluded that, "[u]nder any of the[] analyses used by various courts of appeal[s], [petitioner's] Title VII claims are barred." Pet. App. 35a. With respect to the revocation of the waiver of her military retirement date, the court held that, "[w]hile her removal from active-status compromised her civilian employment at that time, the action taken by defendants was a military personnel management decision." *Ibid.* The court held that petitioner's retaliation claim also is barred "in light of the military component of her military technician status." *Id.* at 36a.

The district court rejected petitioner's argument that the definition of "military technician (dual status)" added by the 1997 amendments to 10 U.S.C. 10216(a), which describes dual-status technicians as "civilian employ-

ees," authorized the court to address her Title VII claims. Pet. App. 36a-37a. The court explained that, although the Federal Circuit in *Jentoft* v. *United States*, 450 F.3d 1342, 1348-1349 (2006), had relied on Section 10216 in holding that a dual-status technician could bring a service-related claim under the Equal Pay Act of 1963, two Fifth Circuit decisions had "declin[ed] to apply *Jentoft* to Title VII claims." Pet. App. 37a (citing *Williams* v. *Wynne*, 533 F.3d 360, 367 (2008), and *Walch* v. *Adjutant Gen.'s Dep't*, 533 F.3d 289, 300 (2008)).

4. The court of appeals affirmed. Pet. App. 1a-21a. The court began by holding that the 1997 amendments to 10 U.S.C. 10216 "do not remove dual-status National Guard technicians from the strictures of the *Feres* [intra-military immunity] doctrine." Pet. App. 14a. In prior decisions, the court observed, the civilian aspect of the dual-status technician positions had given the court "no pause in applying the *Feres* doctrine to the military aspects of that position." *Ibid.* As a result, the panel held that "the recognition in the 1997 amendments that dual-status technicians are federal civilian employees—albeit civilian employees which had as a condition of their employment that they remain members of the armed services—was * * * 'nothing new.'" *Ibid.* The panel concluded that the reference in the 1997 amendments to "any other provision of law" was intended merely "to harmonize the nomenclature to be used for dual-status technicians throughout the U.S. Code." *Ibid.* (citing *Zuress* v. *Donley*, 606 F.3d 1249, 1255 (9th Cir. 2010), petition for cert. pending, No. 10-374 (filed Sept. 16, 2010)). "Indeed," the panel observed, "it would have been odd for Congress fundamentally to alter the legal condition of dual-status technicians in 10 U.S.C. § 10216, a statute that overwhelmingly just addresses

the details of obtaining funding for National Guard positions," Pet. App. 15a (citing 10 U.S.C. 10216(b)), "rather than in 32 U.S.C. § 709, which defines the position of dual-status technician [in the National Guard] and lays out who may and may not occupy such a position," Pet. App. 15a.

Turning to the question whether the district court had correctly dismissed petitioner's Title VII claims under principles of intra-military immunity, the court of appeals observed that different circuits have used somewhat different formulations in describing when dual-status technicians may maintain such claims. Pet. App. 16a-19a. The court of appeals noted that the district court had concluded that petitioner's claims were barred "[u]nder any of these analyses used by various courts of appeal[s]." *Id.* at 16a (first brackets in original; citation omitted). The court of appeals stated that, in any event, it was not persuaded that the various formulations used by most of the circuits "reflect anything more than the unique facts and claims presented by the parties in those particular cases." *Id.* at 18a. The essential question, the court held, is always "whether the injury arose out of activity incident to military service." *Id.* at 19a.[3]

Applying that test, the panel held that the district court had correctly concluded that petitioner's Title VII claims are incident to her military service. Pet. App.

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[3] The court of appeals noted that the Sixth Circuit has apparently held that dual-status technician's Title VII claims always arise out of activity incident to military service because their jobs are "irreducibly military in nature." Pet. App. 19a (quoting *Fisher*, 249 F.3d at 443). The court of appeals "decline[d] to adopt such a categorical rule," explaining that "it is conceivable that a dual-status technician might suffer an injury purely as a civilian that could give rise to a justiciable" Title VII claim. *Ibid.*

19a-21a. "The essential core of [petitioner's] complaint," the court of appeals explained, "is that the Guard discriminatorily revoked" the waiver of her mandatory retirement date, and the "waiver and its revocation related exclusively to her military position—the effect on her civilian position was purely secondary and incidental." *Id.* at 20a. Indeed, the court noted, petitioner "herself informed the district court in her complaint that the Guard claimed a military motive for its actions." *Ibid.* And, in complaining that "she was given work 'that no Colonel would ever be required to perform,'" petitioner herself "identifie[d] as the source of [her] humiliation her military rank of Colonel." *Ibid.* In sum, the court held, petitioner's case "is precisely the *opposite* of a case where a dual-status technician might have a claim against the Guard under Title VII. The action she complained of was purely military, rather than purely civilian, in nature, even though that military action happened to have some civilian consequences." *Id.* at 20a-21a.

ARGUMENT

Petitioner contends (Pet. 8-12) that this Court's review is warranted to resolve two purported circuit conflicts concerning the circumstances under which tort claims by dual-status military technicians are justiciable. Petitioner further contends (Pet. 12-23) that the Court should grant review to clarify that principles of intra-military immunity never bar Title VII claims by dual-status technicians. The courts of appeals (and the Equal Employment Opportunity Commission (EEOC)), however, agree that principles of sovereign and intra-military immunity preclude dual-status technicians from bringing service-related Title VII claims. And no conflict among the courts of appeals on the circumstances in

which dual-status technicians may bring such claims warrants this Court's review. Accordingly, the Court should deny the petition for a writ of certiorari.

1. It is well settled that "[j]urisdiction over any suit against the Government requires a clear statement from the United States waiving sovereign immunity." *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003); accord *Lane* v. *Pena*, 518 U.S. 187, 192 (1996); *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30, 33 (1992). In addition, in *Feres* v. *United States*, 340 U.S. 135 (1950), this Court held that members of the armed forces may not bring suits under the Federal Tort Claims Act (FTCA) for injuries that "arise out of or are in the course of activity incident to service." *Id.* at 146; see also *Stencel Aero Eng'g Corp.* v. *United States*, 431 U.S. 666, 667 n.1, 673-674 (1977) (applying *Feres* to bar a claim by a National Guard officer). The Court has further held that the concerns underlying its decision in *Feres* also require the conclusion that service members may not bring actions under *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), to recover damages for violations of their civil rights or other constitutional torts arising from activities incident to their military service. *United States* v. *Stanley*, 483 U.S. 669 (1987); *Chappell* v. *Wallace*, 462 U.S. 296 (1983). The Court explained that these decisions were driven primarily "by the 'peculiar and special relationship of the soldier to his superiors, [and] the effects of the maintenance of such suits on discipline.'" *Id.* at 299 (brackets in original; citations omitted).

As noted above, see pp. 5-6, *supra*, based on these principles of sovereign and intra-military immunity, the courts of appeals have uniformly concluded that Title

VII does not apply to uniformed members of the armed forces. See *Hodge* v. *Dalton*, 107 F.3d 705, 708 (9th Cir.) (citing cases), cert. denied, 522 U.S. 815 (1997). The courts of appeals also have uniformly concluded that dual-status military technicians may not bring Title VII suits based on alleged discrimination that is incident to their military service. See p. 6, *supra* (citing cases). In such circumstances, those employees, like other uniformed members of the military, may instead pursue various alternative remedies for service-related discrimination claims. See pp. 6-7, *supra*.

Petitioner nonetheless argues (Pet. 12-17) that the 1997 amendments to 10 U.S.C. 10216(a) authorized dual-status military technicians to bring Title VII actions on the same terms as purely civilian employees. Petitioner relies (Pet. 12) on the amendments' statement that the definition of "military technician (dual status)" applies for purposes of Section 10216 "and any other provision of law," coupled with the definition's statement that a "military technician (dual status) is a Federal civilian employee." 10 U.S.C. 10216(a)(1). The court below correctly rejected petitioner's argument, as has every other court of appeals that has considered the issue. See Pet. App. 13a-15a; *Bowers* v. *Wynne*, 615 F.3d 455, 466-468 (6th Cir. 2010); *Zuress* v. *Donley*, 606 F.3d 1249, 1254-1255 (9th Cir. 2010), pet. for cert. pending, No. 10-374 (filed Sept. 16, 2010); *Walch* v. *Adjutant Gen.'s Dep't*, 533 F.3d 289, 299-301 (5th Cir. 2008); see also *Williams* v. *Wynne*, 533 F.3d 360, 366-368 (5th Cir. 2008).

The 1997 amendments do not mention Title VII, purport to authorize any new cause of action against the United States, or contain any language that expressly waives the United States' sovereign immunity. That fact alone requires the conclusion that the amendments do

not waive the sovereign immunity of the United States for Title VII claims by dual-status military technicians that are related to their military service.

The absence of any clear statement creating a cause of action or waiving immunity is particularly fatal to petitioner's argument because, before the 1997 amendments, it was well settled that dual-status military technicians did not have the same rights to bring Title VII actions as purely civilian employees. As discussed above, the courts of appeals had consistently held that uniformed members of the military have no right to sue under Title VII, and the only court of appeals that had addressed the ability of dual-status technicians to sue under Title VII had held that their claims are nonjusticiable when they are service-related. See *Mier* v. *Owens*, 57 F.3d 747, 749 (9th Cir. 1995) (dual-status technicians may not bring Title VII suits based on "personnel actions integrally related to the military's unique structure"), cert. denied, 517 U.S. 1103 (1996). Moreover, numerous other courts had held that principles of intra-military immunity bar dual-status military technicians from bringing damages actions under other statutes based on alleged violations of their civil rights that are incident to their military service. See, *e.g.*, *Wright* v. *Park*, 5 F.3d 586, 586-591 (1st Cir. 1993); *Wood* v. *United States*, 968 F.2d 738, 740 (8th Cir. 1992); *Watson* v. *Arkansas Nat'l Guard*, 886 F.2d 1004, 1005-1008 & n.1 (8th Cir. 1989); *Jorden* v. *National Guard Bureau*, 799 F.2d 99, 107-108 (3d Cir. 1986), cert. denied, 484 U.S. 815 (1987); *Martelon* v. *Temple*, 747 F.2d 1348, 1350-1351 (10th Cir. 1984), cert. denied, 471 U.S. 1135 (1985). Congress is presumed to be familiar with established case law and to expect that its enactments will be interpreted as consistent with that law unless those en-

actments provide otherwise. *United States* v. *Wells*, 519 U.S. 482, 495 (1997). If Congress intended the 1997 amendments to effect the "radical departure[] from past practice" asserted by petitioner, Congress surely would have "ma[de] a point of saying so." *Jones* v. *United States*, 526 U.S. 227, 234 (1999).

In addition, Section 10216(a) "does not end with the statement that dual status technicians are federal civilian employees. It [goes on to] state[] that National Guard technicians and [Air Force Reserve Technicians] are 'dual status' employees because they are federal civilian employees *and* members of the reserve forces." *Bowers*, 615 F.3d at 467 (citation omitted). As explained above, dual-status technicians play a critical role in our nation's military defense, often report to the same military supervisor in both their military and civilian positions, must wear their military uniform while working in their civilian jobs, and must maintain their military status in order to keep their civilian jobs. Nothing in Section 10216 suggests that those facts should be ignored when dual-status technicians attempt to sue the military for alleged Title VII violations that are incident to their military service.[4]

As the court below recognized, the 1997 amendments added the phrase "any other provision of law" to the

[4] Moreover, as the court of appeals observed, "it would have been odd for Congress fundamentally to alter the legal condition of dual-status technicians in 10 U.S.C. § 10216, a statute that overwhelmingly just addresses the details of obtaining funding for National Guard positions," Pet. App. 15a (citing 10 U.S.C. 10216(b)), "rather than in 32 U.S.C. § 709, which defines the position of dual-status technician [in the National Guard] and lays out who may and may not occupy such a position," Pet. App. 15a (noting that "Congress 'does not, one might say, hide elephants in mouseholes'" (quoting *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 468 (2001)).

definition in Section 10216(a)(1) "to eliminate inconsistencies in the nomenclature used to refer to dual status technicians, rather than to override settled case law on intra-military immunity." Pet. App. 13a (internal quotation marks and citation omitted). The House Report accompanying the amendments explained that they were needed because previous enactments contained "provisions defining the term 'military technician' which were not completely consistent with one another." *House Report* 358. The amended definition, the Report explained, "would remove the inconsistencies" by providing a uniform definition for the term "military technician (dual status)." *Ibid.* The legislative history thus confirms that Congress did not intend the 1997 amendments to waive the United States' sovereign immunity for service-related Title VII suits by dual-status military technicians. See Pet. App. 13a-14a; *Zuress*, 606 F.3d at 1255; *Bowers*, 615 F.3d at 467.

2. Contrary to petitioner's contention (Pet. 8-9), this Court's review is not warranted to resolve a purported conflict between the decision below and the Federal Circuit's decision in *Jentoft* v. *United States*, 450 F.3d 1342 (Fed. Cir. 2006). *Jentoft* involved the right of a dual-status military technician to sue under the Equal Pay Act, not Title VII. *Id.* at 1348; see *id.* at 1345 n.2 (noting that Jentoft had abandoned her Title VII claims). Moreover, in concluding that Section 10216(a)'s definition of dual-status technicians as "civilian" employees entitles them to bring service-related Equal Pay Act suits, the Federal Circuit relied on "the plain language of the Equal Pay Act," which defines a covered employee to include "any individual employed by the Government of the United States . . . as a *civilian* in the military departments." *Id.* at 1348 (emphasis added) (quoting

29 U.S.C. 203(e)(2)(A)(i)). Title VII contains no such language. See also *Bowers*, 615 F.3d at 467 (distinguishing *Jentoft* because it involved the Equal Pay Act); *Walch*, 533 F.3d at 300-301 (same).

In any event, to the extent that *Jentoft* is in tension with the Title VII decisions of the other courts of appeals, the Federal Circuit may reconsider its decision in *Jentoft*. The Federal Circuit did not consider the legislative history of the 1997 amendments in reaching its decision, nor did it have the benefit of the analysis of the four circuits that have since held that the 1997 amendments do not authorize service-related Title VII actions by dual-status military technicians. See p. 14, *supra* (citing cases). Nothing would prevent the government from asking the Federal Circuit to reexamine *Jentoft* in light of those considerations in an appropriate case. See Fed. R. App. P. 35(b) (authorizing petitions for initial hearing en banc); Fed. Cir. R. 35(a)(1) (authorizing arguments to a panel that circuit precedent should be overruled).

3. Petitioner also errs in contending (Pet. 8-11) that this Court's review is warranted to resolve a disagreement among the courts of appeals over when dual-status technicians may bring Title VII claims. The vast majority of the circuits that have addressed the issue agree with the court below that dual-status technicians may not bring Title VII claims that "ar[i]se out of activity incident to military service," Pet. App. 19a, although the precise wording that the courts use in articulating that standard varies slightly. See *Overton* v. *New York State Div. of Military & Naval Affairs*, 373 F.3d 83, 95 (2d Cir. 2004) (claim barred unless it is "purely civilian" and does not challenge conduct "integrally related to the military's unique structure"); *Brown* v. *United States*,

227 F.3d 295, 299 (5th Cir. 2000) (claim barred unless it arises "purely" from technician's "civilian position" and does not "originate from [technician's] military status"), cert. denied, 531 U.S. 1152 (2001); *Mier*, 57 F.3d at 748 (claim barred if challenged conduct is "integrally related to the military's unique structure"). As the court of appeals in this case noted (Pet. App. 19a), the Sixth Circuit appears to have adopted a categorical bar on Title VII claims by dual-status technicians, reasoning that their claims always arise out of their military status because their positions are "irreducibly military in nature." *Fisher* v. *Peters*, 249 F.3d 433, 439 (2001). Drawing on the decisions of other courts of appeals, however, the court in *Fisher* also considered whether "the challenged actions are integrally military or within the military sphere." *Id.* at 443. In any event, any apparent difference in approach has not led to a difference in outcomes, because no court of appeals has encountered a Title VII claim by a dual-status technician that did not arise out of activity incident to military service. Absent evidence that divergent approaches among the courts of appeals are resulting in divergent outcomes, this Court review of the issue is not warranted.[5]

Even if the Court's review might be warranted in an appropriate case, review would not be warranted here because both courts below concluded that petitioner's Title VII claims arise out of activity incident to her military service and therefore would not be cognizable in any circuit. See Pet. App. 16a, 19a-21a, 35a-36a. As explained by the courts below, decisions relating to wheth-

[5] Petitioner identifies only a single district court decision that has allowed a dual-status technician's Title VII claim to proceed. See Pet. 11 (citing *Laurent* v. *Geren*, Civ. No. 2004-0024, 2008 WL 4587290 (D.V.I. Oct. 10, 2008)).

er a service member will be allowed to remain in the military are clearly service-related. See *id.* at 20a, 35a. Petitioner makes no serious argument to the contrary. Because petitioner's claim, as it comes to this Court, would not be cognizable in any circuit, this case does not present an appropriate vehicle to resolve any disagreement among the courts of appeals about whether all Title VII claims by dual-status military technicians are necessarily service-related.

4. Finally, petitioner argues (Pet. 17-23) that the Court should grant review in order to hold that principles of intra-military immunity never bar Title VII claims by dual-status technicians. That position, however, lacks merit and has been uniformly rejected not only by the courts of appeals but also by the EEOC.

Petitioner asserts (Pet. 17-21) that the rationales underlying the doctrine of intra-military immunity do not apply to service-related Title VII claims because "illegal discrimination is not a legitimate tool of military order." Pet. 20. The doctrine of intra-military immunity, however, is based on the recognition that merely allowing judicial consideration of service-related claims for damages by uniformed military personnel against the military could result in the second-guessing of military judgments and other intrusions into the military mission. See *United States* v. *Johnson*, 481 U.S. 681, 691 (1987) (noting that "a suit based upon service-related activity necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of the military mission"); *United States* v. *Stanley*, 483 U.S. 669, 682 (1987) ("[a] test for liability that depends on the extent to which particular suits would call into question military discipline and decisionmaking would itself require judicial inquiry into, and

hence intrusion upon, military matters"); *United States* v. *Shearer*, 473 U.S. 52, 58 (1985) (barring FTCA suit alleging negligent supervision of service member because "[t]o permit this type of suit would mean that commanding officers would have to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions," including "whether to discharge a serviceman"). Thus, the fact that employment discrimination does not serve the military mission is beside the point. Even accepting that fact, allowing courts to entertain service-related Title VII claims—rather than permitting the military itself to address such claims through its own internal administrative processes—threatens to disrupt the "peculiar and special relationship of the soldier to his superiors," to undermine military "discipline," and to interfere with the conduct of the military mission. *Chappell*, 462 U.S. at 299 (citation omitted).

Petitioner also notes that Congress, in 42 U.S.C. 2000e-16(a), has provided that "[a]ll personnel actions affecting employees . . . in military departments . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin." Pet. 21 (emphasis omitted). As noted above, however, the courts of appeals have unanimously concluded that this language does not authorize uniformed members of the armed forces to bring employment discrimination suits. See, *e.g.*, *Hodge*, 107 F.3d at 708 (citing other circuits). And EEOC regulations take the same view. See 29 C.F.R. 1614.103(d)(1).

Petitioner argues that the EEOC reviews Title VII claims brought by dual-status military technicians "with no demonstrable effect on military order." Pet. 21. That argument overlooks the fact, which petitioner else-

where acknowledges (See Pet. 22-23 n.5), that the EEOC has ruled that dual-status military technicians may obtain relief under Title VII only for discrimination that arises from their civilian capacity. Thus, the EEOC's decisions recognize that technicians may not bring a Title VII action based on any personnel decision that "affect[s] their capacity as uniformed military personnel." *Muse* v. *Geren*, EEOC Doc. 0120083293, 2008 WL 4463514, at *2-*3 (E.E.O.C. Sept. 26, 2008); accord *Brown* v. *Wynne*, EEOC Doc. 0420050011, 2007 WL 1523917, at *2 (E.E.O.C. May 16, 2007); *Snyder* v. *Roche*, EEOC Doc. 01A23583, 2003 WL 1791143, at *2 (E.E.O.C. May 26, 2003); *Conley* v. *Widnall*, EEOC Doc. 01945532, 1995 WL 81271, at *1 (E.E.O.C. Feb. 16, 1995). That standard is not materially different from the standard articulated by the court below, which is whether the employee's claim "arose out of activity incident to military service." Pet. App. 19a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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